IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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| PHILLIP R. THOMAS, | * | |
| Plaintiff, | * | |
| v. | * | Civil Action No. RDB-07-1670 |
| ALCOA INC., | * | |
| Defendant. | * | |

* * * * * * * * * * * * *

**MEMORANDUM OPINION**

Plaintiff Phillip R. Thomas ("Plaintiff" or "Thomas") filed this single-count Complaint under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*., against his former employer, Defendant Alcoa Inc. ("Defendant" or "Alcoa"). Plaintiff seeks the reinstatement of his eligibility for long-term disability benefits under the Employees' Group Benefit Plan of Alcoa Inc., Plan II - No. 503.

Pending before this Court are the cross motions of the parties: Plaintiff's Motion for Summary Judgment (Paper No. 14) and Defendant's Motion for Summary Judgment (Paper No. 15). This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2008). For the reasons stated below, Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment are both DENIED, and this case shall be remanded to the Defendant plan administrator for further consideration.

**BACKGROUND AND PROCEDURAL HISTORY**

The following facts have been taken from the parties' briefs and exhibits and will be viewed in a light most favorable to the party opposing judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

## I. Alcoa's Long-Term Disability Plan Administration

The Employees' Group Benefit Plan of Alcoa Inc., Plan II - Plan No. 503 ("the Plan") is a self-funded, ERISA-governed welfare plan that provides long-term disability benefits to eligible participants. The Plan's provisions are discussed at length for the participants in the Summary Plan Description. (R. 1109-1127.)[1] The Plan is self-funded in that it is both administered and insured by Alcoa. As plan administrator, Alcoa is vested with "discretionary authority to determine eligibility under all provisions of the plan" and is the interpreter of "plan provisions for all participants and beneficiaries." (R. 1117.)

Alcoa delegates various administrative duties to third-party claims administrators, including the processing of initial eligibility determinations for long-term disability benefits. Thomas' original claim was filed in 2002 when MetLife Disability ("MetLife") was the designated claim administrator. (R. 1118.) Broadspire Services, Inc. ("Broadspire") was retained as claims administrator as of January 1, 2005. (R. 1125.)

A plan participant may file a first-level appeal to the claims administrator. (R. 1126.) When necessary, a second and final appeal may be made to Alcoa's Benefits Management Committee ("Appeals Committee"). (R. 1127.) The Plan reserves the right to require the insured to submit to an independent medical examination when the insured files for disability

[1]The Parties submitted their Joint Designation of Administrative Record on October 1, 2007, and is cited by reference to Bates numbers.

benefits. (R. 1114.)

## II. Pertinent Plan Provisions

The terms of the Plan state that a participant is "totally disabled" and eligible for long-term benefits when, due to injury or sickness:

> for the first 24 months, you cannot perform each of the material duties of your regular job; and
>
> after the first 24 months, you cannot perform each of the material duties of any gainful occupation for which you are reasonably suited by training, education, or experience.

(R. 1123.) The Plan thus applies a different standard to disability determinations based on the duration of an employee's incapacity: the "regular occupation" standard for the first two years, and a heightened "any occupation" standard thereafter. (*Id.*) The Plan further provides that long-term benefits will not be paid during "any period for which you do not provide proof of your continued total disability, as required by the claims administrator." (R. 1114.)

## III. Thomas' Medical and Claim History

### A. 2002 – 2005

Plaintiff Phillip Thomas was employed by Alcoa as an extrusion press operator. (Compl. at ¶ 5.) In April 2002, Thomas went on a medical leave of absence and began receiving short-term disability benefits due to various medical afflictions, including cervical radiculopathy, lumbar disc disease, carpal tunnel syndrome, morbid obesity, diabetes, and sleep apnea. (R. 1022, 1026.)

On August 22, 2002, computed tomography (CT) scans of Thomas' cervical spine revealed "broad based central herniated disc[s] and osteophyte formation" from the axis down to the sixth vertebrae and revealed stenosis from the third to sixth vertebrae. (R. 0604.) As a result

of initial diagnosis, Thomas filed for long-term disability benefits under the Plan, and his claim was approved under the twenty-four month or "regular occupation" provision. Thomas began receiving long-term disability benefits under the Plan on October 8, 2002. (R. 0117.)

Soon thereafter, on November 18, 2002, Thomas applied for Social Security disability benefits. (Pl.'s Mem. at 7.) An administrative law judge approved his claim, finding that Thomas had a tenth grade education level, that his past employment at Alcoa was skilled labor, and that his skills were not transferrable to the skilled or semi-skilled functions of other sedentary work. (R. 0078-82.)

In February 2003, Dr. Henry M. Shuey, Jr., a board certified neurosurgeon, found that Thomas continued to have "some right cervical radiculitis and shoulder weakness" but had not developed "hand weakness . . . clumsiness of gait, or overt spinal cord dysfunction symptoms." (R. 0607.) After noting that Thomas preferred "non-operative care . . . using medication," Dr. Shuey further acknowledged that "[Thomas] is probably developing a fixed neurological dysfunction." (*Id*.) After another follow-up appointment on May 12, 2003, Dr. Shuey determined that Thomas was "probably disabled from the workforce, primarily from the spine problems of neck and back which are quite significant." (R. 0300.) On August 22, 2003, as a result of further evaluations, Dr. Shuey concluded that Thomas was permanently disabled from the work force due to Lumbar Spondylosis with myelopathy. (R. at 0306.)

On October 14, 2003, Thomas met with Dr. Michael Kaplan, a pain management physician, to have his functional capacity assessed. (R. 0616.) During the evaluation, Dr. Kaplan noted that Thomas continued to lose weight, but could not walk two-hundred feet without getting short of breath and having spasms, which was the result of "degenerative

changes in his lumbar spine as well as morbid obesity." (*Id*.) Six months later, on March 14, 2004, Thomas returned to Dr. Kaplan, at which point Dr. Kaplan noted that, in his opinion, Thomas could not "sit more than an hour intermittently[,] or stand at all periodically[,] or walk any considerable length of time because of his health problems . . . . He definitely cannot climb, twist, bend, or stop or reach above his shoulders because of his cervical pain." (R. 0746.) Dr. Kaplan also noted that Thomas could only occasionally lift as much as ten pounds and could not perform fine finger movements with his dominant (right) hand. (*Id*.) In totality, Dr. Kaplan stated as follows: "I do think he is permanently disabled and he has a very poor prognosis with all of his health concerns . . . ." (*Id*.)

On March 24, 2004, MetLife, the former designated claim administrator, sent Thomas a letter informing him that his long-term disability benefits would be extended because Thomas met the Plan's definition of totally disabled under the heightened "any and all occupation" standard required for individuals seeking long-term disability after two years. (R. 0138.) Thus, during the administration of the Plan by MetLife there was no dispute as to Thomas' long-term disability status.

**B. 2005 – present**

On January 1, 2005, Broadspire replaced MetLife as the claims administrator. Also in January 2005, Thomas had a magnetic resonance image ("MRI") taken of his cervical spine. According to the referring physician, Irene Darocha, the MRI revealed the following: (1) "significant interval increase in size of disc herniations" in the fourth, fifth, and sixth vertebrae compared to the 2002 review, and that there continued to be disc herniations in second and third vertebrae; (2) "severe to critical" canal stenosis in the fourth and fifth vertebrae; (3) evidence of

spinal cord edema and gliosis; and (4) "severe" bilateral neural foraminal stenosis. (R. 0709-10.)

On February 4, 2005, Dr. Shuey diagnosed Thomas with diabetes and "severe" carpal tunnel syndrome. (R. 0749-50.) Electrodiagnostic testing of his upper extremities had revealed evidence of sensory neuropathy. (*Id*.) Dr. Shuey informed Thomas that "he [did] not have any options and that he should have surgery." (*Id*.) On March 18, 2005, Dr. Shuey performed anterior cervical fusion and discectomy surgery. (R. 0997-98.)

Three months after undergoing surgery, Dr. Kaplan reassessed Thomas. On June 6, 2005, Dr. Shuey found that Thomas remained incapable of standing or sitting for any extended period of time, and that he was permanently disabled as a result of chronic pain syndrome secondary to cervical and lumbar radiculopathy, which was further complicated by carpal tunnel syndrome, diabetic peripheral neuropathy, morbid obesity, and sleep apnea. (R. 0837-38.) A MRI taken on October 20, 2005, revealed that after surgery there was a reduction in stenosis between the fourth, fifth, and sixth vertebrae, but an increase in stenosis between the third and fourth vertebrae. (R. 0708.)

On November 29, 2005, Dr. Eddie Sassoon, a specialist in physical medicine and rehabilitation, was retained by Broadspire to review Thomas' medical documentation. (R. 0986.) Dr. Sassoon reviewed the medical file, including Dr. Kaplan's findings, and determined that Thomas' medical documentation supported a functional impairment from March 2005 to May 2005, but not beyond May 2005 because Thomas was "doing very well . . . [and] had just about full range of motion and was no longer wearing a cervical collar." (R. 0987.) Dr. Sassoon noted that, on June 6, 2005, Dr. Kaplan had recommended "restrictions [including] no lifting greater than 10 [p]ounds, no repetitive activity, no heavy lifting, [and no] stand[ing] or sitting for

an extended period of time." (*Id*.) Dr. Sassoon determined that "the period of [March 18, 2005] through [May 9, 2005] would be reasonable for recovery of this type of surgery . . . . With regards to any occupational disability . . . [Thomas] should be able to return to any occupation . . . with respect to restrictions with sedentary physical exertion [and] avoidance of prolonged sitting or standing greater than [30 minutes] without changing position." (R. 0987-88.) This marked the first time that there had been any dispute with respect to Thomas' long-term disability. More importantly, this analysis by Dr. Sassoon was made without any effort on his part to personally examine Thomas.

As a result of these findings, Broadspire notified Thomas in December of 2005 that

> it is determined there is a lack of medical documentation of a functional impairment that would preclude you from performing in any occupation. Because the available documentation does not substantiate your continued disability status, you will need to submit any additional medical documentation you may have which supports that you remain disabled as defined by your Plan. This information must be forwarded to our office within 30 days.

(R. 0440.) For reasons that remain unclear to this Court, Thomas failed to supply additional information within the time frame. (R. 0990.)

On January 27, 2006, Dr. Kaplan noted that Thomas continued to have "significant cervical radicular pain" as well as progressive numbness in his hands. (R. 1011.) Thomas also had lumbar radicular pain, thoracic pain, and numbness in his feet. (*Id*.) Dr. Kaplan reported that Thomas could not "sit or stand for any period of time without being very uncomfortable and on several occasions he feels as if he is going to fall." (*Id*.)

Broadspire conducted an "Employability Assessment Report," dated February 6, 2006,

and a "Labor Market Survey," dated March 2, 2006, in order to identify potential jobs for which Thomas might be suited. (R. 0967, 0975) The reports were based on a questionnaire completed by Thomas in June of 2005, the review of medical records by Dr. Sassoon, and a telephone interview with Thomas. (R. 0967, 0975.) Based on Thomas' prior experience as an extruder operator, the employability assessment concluded that Thomas was reasonably suited for the following jobs: focuser, assembler, and phonograph assembler. (R. 0972.) The Labor Market Survey identified two jobs that satisfied the proximity, medical and wage requirements – a front desk job at the Hyatt on Capitol Hill, and an electronic assembler/small parts position with Manpower. (R. 0981-82.)

On March 15, 2006, Broadspire notified Thomas that his benefits would cease in sixteen days—on March 31, 2006. (R. 0989.) Exercising his rights under the Plan, Thomas timely appealed the initial decision to terminate coverage. (R. 0003.)

In assessing Thomas' appeal, Broadspire retained peer reviews from both Dr. Robert Ennis, a specialist in orthopedic surgery, and Dr. Tamara Bowman, a specialist in internal medicine. (R. 1015, 1020) Both doctors conducted paper reviews of Thomas' record but did not medically examine Thomas. Dr. Ennis reviewed Thomas' medical history as well as 2006 follow-ups with Dr. Kaplan and found that Broadspire's recommended employment opportunities "appear to be appropriate." (R. 1018.) In particular, Dr. Ennis noted that Thomas' post-surgery medical records lacked objective tests and were based primarily on subjective complaints of pain. (*Id*.) Dr. Ennis further reported that the "documentation therefore does not support a functional impairment that would prevent the claimant from working in any occupation . . . ." (*Id*.)

Dr. Bowman interpreted Thomas' medical history likewise, finding that there was no objective documentation to support his reported diabetes, morbid obesity, and sleep apnea syndrome. (R. 1022.) In totality, Dr. Bowman determined that the "alternative positions which have been identified appeared to be appropriate for [Thomas]." (R. 1023.) Under the advisement of Dr. Enis and Dr. Bowman, Broadspire denied Thomas' first-level appeal on May 3, 2006. (R. 1025.)

Meanwhile, Thomas' treating physicians, Dr. Kaplan, Dr. Shuey, Dr. Oren Blam, and Dr. Gallager, continued to maintain that employment was not possible. On March 24, 2006, Dr. Kaplan wrote to Thomas as follows:

> There is no way you could perform any kind of meaningful job . . . . The thought of you even returning to any type of even part time position is unheard of . . . . [T]hese are chronic conditions that will not improve at all. The nerve damage has already been done and/or may even get worse unfortunately.

(R. 0052.) On June 6, 2006, Dr. Kaplan wrote that Thomas was experiencing "worsening cervical, thoracic and lumbar spine disorders, including degenerative disc disease, disc desiccation, spondylosis, disc herniation and protrusion, forminal stenosis, and possibly cervical cord compression." (R. 0057-62.) Dr. Kaplan also found Thomas still suffered from carpal tunnel syndrome, morbid obesity, sleep apnea, and peripheral neuropathy secondary to diabetes. (R. 0052-53.)

After reviewing his medical records and the conclusions drawn by Broadspire, Dr. Gallager wrote in a letter to Thomas on June 16, 2006, that "[t]his is a most distasteful report [*i.e.* the report prepared by Broadspire] which has the appearance of being contrived to circumvent or obscure the obvious and create artificial and inappropriate barriers to the ultimate

and inescapable conclusion that you are irrefutably 100% disabled."[2] (R. 0062.) Furthermore, on July 19, 2006, Dr. Blam, an orthopedic surgeon, stated that "[Thomas] is likely to require a long-term disability" (R. 0036) and, on July 27, 2006, Dr. Shuey reasserted that Thomas is "disabled from the workplace with his peripheral neuropathy as well as his spinal cord injury" (R. 0040-41.)

In a letter addressed to the Secretary of Alcoa's Appeals Committee, Thomas made his final appeal under the Plan on September 15, 2006, in hopes of reestablishing his long-term disability benefits. (R. 0003-04.) In doing so, Thomas attached ten exhibits in support of his claim that he was unable to "perform each of the material duties of any gainful occupation." (*Id*.)

In reviewing Thomas' claim, the Appeals Committee requested a third-party medical review from Dr. Donald McGraw. (R. 0012.) Dr. McGraw concluded as follows:

> [W]ith a reasonable degree of medical certainty . . . Mr. Thomas was not totally disabled beyond [March 31, 2006], as defined by [the Plan]. He certainly has been unable to perform each of the material duties of his regular job, but it appears, based on all of the most recent documents made available to me, that there was insufficient evidence to demonstrate that he was unable to perform the material duties of any gainful occupation . . . .

(R. 0023-24.) Dr. McGraw also found that "there [is] some bases [*sic*] for disagreement on the exact limitations" of Thomas' medical condition and acknowledged that

> it is clear that [Thomas] has remained morbidly obese and has continued to experience progressive gradual degeneration of his

[2] Thomas has been prescribed heavy volumes of prescription drugs, leading Dr. Gallager to conclude that Thomas was dependant upon narcotics. (R. 0061-62.) The record indicates that Thomas has been prescribed, at a minimum, Percocet, Roxicodone, Topamax, Kadian, Valium, and Morphine. (R. 0051, 0525, 0618, 0619, 0736, 0745, 0748, 0758.)

> lumbosacral spine and cervical spine . . . . This has resulted in pain management issues and at least some degree of radiculopathy, which has been documented by EMG/nerve conduction studies of the upper and lower extremities. Mr. Thomas has documented carpal tunnel syndrome bilaterally as well, with continued subjective complaints of dropping objects and [an] inability to perform fine movements, including writing. His diabetic control has worsened, to some degree, and it is not entirely clear how much of his peripheral neuropathy is due to diabetes and how much [is due] to his lumbar radiculopathy. In any event, his gait was unsteady, he was walking awkwardly, and has fallen on at least one occasion.

(R. 0023.)

In light of Dr. McGraw's findings, the Appeals Committee proceeded to review Thomas' medical history and concluded that Thomas was not totally disabled as defined by the Plan. (R. 0001.) The Appeals Committee therefore upheld the denial of benefits, and denied Thomas' second-level appeal. (*Id*.)

Thomas filed a timely challenge to Alcoa's denial of benefits in this Court, seeking, *inter alia*, a monetary judgment for accrued disability benefits, plus interest and costs, that he contends are due to him under the Plan. (Compl. ¶ 10.) This suit is brought pursuant to the ERISA provision which allows a plan beneficiary to sue "to recover benefits due to him under the terms of his plan. . . ." 29 U.S.C. § 1132(a)(1)(B).

## SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court explained

that only "facts that might affect the outcome of the suit under the governing law" are material. *Id.* at 248. Moreover, a dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The Supreme Court further explained that, in considering a motion for summary judgment, a judge's function is limited to determining whether sufficient evidence supporting a claimed factual dispute exists to warrant submission of the matter to a jury for resolution at trial. *Id*. at 249. A court is obligated to consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587; *see also E.E.O.C. v. Navy Federal Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). Rule 56 requires that summary judgment be granted against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When both parties file motions for summary judgment, as here, the court applies the same standards of review. *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 45 n.3 (4th Cir. 1983) ("The court is not permitted to resolve genuine issues of material fact on a motion for summary judgment—even where . . . both parties have filed cross motions for summary judgment.") (emphasis omitted). The role of the court is to "rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard." *Towne Mgmt. Corp. v. Hartford Acc. & Indem. Co.*, 627 F. Supp. 170, 172 (D. Md. 1985). "[B]y the filing of a motion [for summary judgment] a party concedes that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his

adversary's theory is adopted." *Nafco Oil & Gas, Inc. v. Appleman,* 380 F.2d 323, 325 (10th Cir. 1967); *see also McKenzie v. Sawyer,* 684 F.2d 62, 68 n.3 (D.C. Cir. 1982) ("[N]either party waives the right to a full trial on the merits by filing its own motion.").

**STANDARD OF REVIEW IN AN ERISA CASE**

It is well settled that when discretionary powers are conferred to the administrator or fiduciary of a plan, its decisions are reviewed for abuse of discretion. *Booth v. Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan,* 201 F.3d 335, 341-42 (4th Cir. 2000); *Dunbar v. Orbital Sciences Corp. Group Disability Plan,* 265 F. Supp.2d 572, 577 (D. Md. 2003). Because the parties do not dispute that the Plan gives Alcoa, as plan administrator, the discretion to determine benefit eligibility and to construe the terms of the policy, this Court employs the abuse of discretion standard. *See, e.g., Woods v. Prudential Ins. Co. of Am.*, 528 F.3d 320, 322 (4th Cir. 2008) (citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989)). The abuse of discretion standard has been described as a deferential standard of review, which "requires that a reviewing court not disturb an administrator's decision if it is reasonable, even if this Court would have reached a different conclusion." *Feder v. Paul Revere Life Ins. Co.*, 228 F.3d 518, 522 (4th Cir. 2000); *see also Laser v. Provident Life & Accident Ins. Co.*, 211 F. Supp. 2d 645, 649-50 (D. Md. 2002).

An administrator's eligibility determination is reasonable if it is the product of a deliberate, principled reasoning process and if it is supported by substantial evidence. *Bernstein v. CapitalCare, Inc*., 70 F.3d 783, 788 (4th Cir. 1995); *Ellis v. Metropolitan Life Ins. Co.*, 126 F.3d 228, 234 (4th Cir. 1997). When evaluating the reasonableness of a benefits decision, courts in the Fourth Circuit are guided by several non-exclusive factors: "(1) the language of the plan;

(2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have." *Booth*, 201 F.3d at 342-43.

A district court reviewing an administrator's decision may not consult extrinsic evidence that was not brought before the administrator. *Elliott v. Sara Lee Corp.*, 190 F.3d 601, at 608-609 (4th Cir. 1999). Affidavits or other forms of evidence submitted after a denial decision are considered extrinsic. *Martin v. Metropolitan Life Ins. Co.*, 2002 U.S. Dist. LEXIS 26621, at *14 (E.D.Va. Sept. 23, 2002) (citing *Elliott*, 190 F.3d at 608-09). As a result, this Court limits its inquiry to the record as it existed at the time of Alcoa's final eligibility determination.[3]

Although the abuse of discretion standard applies in all cases where the plan administrator enjoys discretionary authority, administrators that operate under a conflict of interest are entitled to less deference. *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 87 (4th Cir. 1993). "The Fourth Circuit applies a sliding scale reduction of deference depending on the degree of the conflict of interest, and thus deviates from the usual abuse of discretion

[3] Defendant properly submitted an affidavit of Fran Filipovits as an exhibit to its Motion for Summary Judgment in order to authenticate the administrative record. (Def's Reply at 6-7.); *Anderson v. Sara Lee Corp.*, 348 F. Supp. 2d 618, 626 (W.D.N.C. 2004). However, none of the information contained in Defendant's affidavit was considered by this Court in its review of Alcoa's decision under the abuse of discretion standard since the affidavit was not part of the record at the time of the administrator's decision.

standard of review 'only to the extent necessary to counteract any influence unduly resulting from the conflict.'" *Brodish v. Fed. Express Corp. Long Term Disability Plan*, 384 F. Supp. 2d 827, 832 (D. Md. 2005) (quoting *Elliott*, 190 F.3d at 605). Under the sliding scale approach, courts modify the abuse of discretion standard so that the amount of deference provided to the fiduciary's decision corresponds inversely with the degree of the conflict. That is, the greater the conflict, "the more objectively reasonable the administrator or fiduciary's decision must be and the more substantial the evidence must be to support it." *Elliott*, 190 F.3d at 605.

Courts have discerned a potential conflict of interest and applied a modified abuse of discretion standard where the plan administrator is also the insurer of the plan. *See, e.g.*, *Bernstein*, 70 F.3d at 788 (applying modified standard based on the fact that plan administrator was plan insurer); *Ellis*, 126 F.3d at 233 (finding a conflict of interest based on administrator's dual role as plan fiduciary and insurer). The Summary Plan Description states that long-term disability benefits "are administered and sponsored by Alcoa" (R. 1117.) and Defendant has acknowledged that the Plan is self-funded and that the company serves as plan administrator. (Def.'s Mem. at 2.) Alcoa's dual functions under the Plan undermine its ability to remain partial in hearing claims of beneficiaries. Eligibility decisions, ultimately under the purview of Alcoa, directly and immediately impact its operating budget and bottom line. As a result, Defendant has a financial stake in the outcome of its benefits decisions—*i.e*. the lower the amount of benefits paid, the lower the amount of funding that is required.

This Court is not persuaded by Defendant's argument that the roles played by Broadspire's and Alcoa's Appeals Committee in the review process effectively eliminate any element of bias. Although some administrative duties are delegated to Broadspire, the Plan

expressly provides that Alcoa retains ultimate discretionary authority as plan administrator and sponsor. (R. 1117.) Indeed, it was Alcoa—and not Broadspire—that issued the final dismissal of Thomas' appeal for disability benefits, which is the subject of our review. (R. 0001-02.) In addition, this Court is not satisfied that the Company's internal Appeals Committee is sufficiently disinterested. It is conceivable that the decisions of the Alcoa employees serving on the Appeals Committee would impact their performance reviews and standing within the company, thus jeopardizing their impartiality. The potential for bias would be especially high if certain Appeals Committee members were active officers of the company or if they served at the pleasure of the company's board of directors.[4] *See Willis v. Baxter International, Inc.*, 175 F. Supp. 2d 819, 827 (W.D.N.C. 2001) (concluding that the administrator's "[appeals] committee, which made the ultimate determination, was...conflicted, inasmuch as its members were also employees or agents of the company or carrier that would ultimately foot the bill if a determination favorable to plaintiff was rendered."). Upon a finding of a potential conflict of interest, this Court has previously applied the modified abuse of discretion standard. *See Laser*, 211 F. Supp. 2d at 649. The modified abuse of discretion standard will be applied in this case.

**ANALYSIS**

Applying the principles set forth above, this Court must determine on the record whether Alcoa's eligibility determination was the product of a deliberate, principled reasoning process and was based on substantial evidence. Because of the prospect of a conflict of interest, this Court will determine if Alcoa's decision was consistent with an exercise of discretion by a

[4]The record bears little evidence describing the structure, staffing, and operating policies of Alcoa's Appeals Committee.

fiduciary acting free of the interests that conflict with those of the beneficiaries. *Ellis*, 126 F.3d at 233-34; *Bedrick v. Travelers Ins. Co.*, 93 F.3d 149, 152 (4th Cir. 1996); *Thomas v. Liberty Life Assur. Co. of Boston*, 226 F. Supp. 2d 735, 743 (D. Md. 2002).

A. Deliberate and Principled Reasoning Process

As an initial matter, this Court notes that the probable conflict of interest in this case not only reduces the deference afforded to Alcoa, but also serves as an independent factor in the evaluation of the reasonableness of its benefits decision. *See, e.g.*, *Bruch*, 489 U.S. at 115 (noting that a "conflict [of interest] must be weighed as a 'factor[] in determining whether there is an abuse of discretion.'" (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)); *Booth*, 201 F.3d at 342-43 ("A fiduciary's conflict of interest, in addition to serving as a factor in the reasonableness inquiry, may operate to reduce the deference given to a discretionary decision of that fiduciary"). Because of the probable conflict and the additional shortcomings described below (especially Alcoa's failure to obtain an independent medical examination of Thomas), this Court concludes that Alcoa's eligibility decision was unreasonable and that Thomas was not afforded a "full and fair review." *See Evans v. Metropolitan Life Ins. Co.*, 358 F.3d 307, 315 (4th Cir. 2004) ("A plan administrator has a duty to conduct a full and fair review of benefit applications.").

Thomas initially qualified for long-term disability benefits in December of 2002 and Alcoa extended these benefits in March of 2004 upon a determination that Thomas was "totally disabled" under the heightened "any and all occupation" standard. (R. 0138.) However, Thomas' disability status was reassessed soon after MetLife was replaced by Broadspire as Alcoa's third party administrator. In March of 2006, Broadspire informed Thomas that he was

no longer considered "totally disabled" under the Plan and that his benefits would be terminated effective April 1, 2006. (R. 0989-91.) In November of 2006, Alcoa's in-house Appeals Committee dismissed Thomas' appeal based upon its finding that "the medical documentation provided does not indicate a totally disabling condition as defined by the plan." (R. 0001.)

Alcoa's 2006 decision affirming the termination of Thomas' benefits is plainly inconsistent with the previous decision to extend them; such inconsistency in the interpretation of the Plan underlines the unreasonableness of Alcoa's subsequent decision.[5] *See, e.g.*, *Booth*, 201 F.3d at 342-43; *Smith v. Continental Casualty Co.*, 276 F. Supp.2d 447, 460 n.6 (D. Md. 2003) ("a reversal of a decision of disability may warrant significant skepticism when substantial evidence does not support the conclusion that the disability has ceased."); *Adelson v. GTE Corp.*, 790 F. Supp. 1265, 1273 (D. Md. 1992) (weighing plan administrator's inconsistent interpretation as a factor in finding an abuse of discretion).

The timing and circumstances of this reversal further stoke this Court's suspicion. Thomas' eligibility status was reassessed and reversed soon after Broadspire replaced MetLife as third party administrator. This sudden about-face is alarming in view of the evidence in the record showing that Thomas' disability was degenerative and had progressively worsened over time. After his benefits were extended in 2004, Thomas complained of increased numbness in his upper extremities and increased radicular pain. (R. 0737-38.) A January 2005 MRI

[5] Defendant correctly notes that the Fourth Circuit has held that no vested right to benefits accrues under an employee benefits plan, meaning that when a plan so provides, an administrator is permitted to terminate benefits that were previously granted. (Def's Mem. at 15, fn. 8) (citing *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994); *Webster v. Black & Decker (U.S.), Inc.*, 33 Fed. Appx. 69, 75 (4th Cir. 2002)). Nevertheless, a reviewing court may properly assess an administrator's inconsistent interpretations as indicative of unreasonableness.

documented a "significant" increase in the size of certain disc herniations and the development of "severe to critical" canal stenosis with evidence of cord edema and gliosis, and severe bilateral neural foraminal stenosis. (R. 0709-10.) Soon thereafter, Thomas was diagnosed with diabetes and electrodiagnostic testing revealed evidence of sensory neuropathy. (R. 0749-50.) In the months following his surgery in March of 2005, MRI testing revealed increased stenosis and chronic radicular pain, thoracic pain, numbness in his feet and progressive numbness in his hands. (R. 0707-0708, 1011.) Successive MRI and electrodiagnostic tests in 2006 revealed the further deterioration of his spine and ongoing neurological injuries which contributed to his chronic pain syndrome and his development of spinal gait disturbance. (R. 0057, 0058-59, 0061-62, 1007, 1009, 1011.) The evidence even indicates that Thomas had become dependent upon narcotic pain medications. (R. 0061-62.) This abridged version of the record tells a story of undeniable deterioration. Indeed, Dr. McGraw, who was retained by Broadspire in connection with Thomas' administrative appeal, acknowledged that Thomas' spine disorder and diabetic control had worsened since the onset of disability. (R. 0023-24.) It is therefore hard to fathom how Alcoa could have affirmed the reversal in Thomas' eligibility determination when the record is replete with evidence marking the continual decline in his health.

The cursory nature of Alcoa's review process is further exposed by the fact it did not conduct an independent medical examination of Thomas. Alcoa's Plan specifically permits the company to require such testing at its option. (R. 1114.) While independent examinations are not required, they are common in ERISA cases, and courts are wary of conflicted administrators who deny benefits without utilizing them. *See, e.g.*, *Laser*, 211 F. Supp. 2d at 650; *Watson v. UnumProvident Corp.*, 185 F. Supp. 2d 579, 581-82 (D. Md. 2002).

Alcoa's decision to forego independent testing is especially glaring in light of the fact that Thomas was examined by four treating physicians over a prolonged period of time who consistently certified that he was totally disabled. The emphatic tone of Thomas' treating physicians is worth noting. In his March 2006 correspondence with Thomas, Dr. Kaplan stated:

> The thought that you could do any type of repetitive actions or even work again in the future with all of your issues is absolutely unheard of. You have been out of work for quite some time now and we have considered you to be permanently disabled . . . with the neuropathy in your upper and lower extremities and with cervical, thoracic, and lumbar radicular pain that you have not to mention the severe osteoarthritis in your knees. There is no way you could perform any kind of meaningful job. With the neuropathy in your hands alone any type of fine manipulations or repetitive actions or even writing for any period of time you would not be able to do because of the nerve damage you already have. The thought of you even returning to any type of even part time position is unheard of . . . . [T]hese are chronic conditions that will not improve at all. The nerve damage has already been done and/or may even get worse unfortunately.

(R. 0052-53.) After reviewing Broadspire's opinion that Thomas was suited for sedentary employment, Dr. Gallager wrote in a letter to Thomas on June 16, 2006, that "[t]his is a most distasteful report which has the appearance of being contrived to circumvent or obscure the obvious and create artificial and inappropriate barriers to the ultimate and inescapable conclusion that you are irrefutably 100% disabled." (R. 0062.)

The failure of Alcoa to require Thomas to submit to independent medical testing in the face of such clear and unequivocal language leads this Court to question whether the company properly considered the reports submitted by Thomas' treating physicians. *See Watson*, 185 F.

Supp. 2d at 581-82 (faulting administrator for relying upon "strictly a 'paper' review of incomplete records" without ordering an independent medical examination when the claimant's treating cardiologist was "emphatically insistent" that she was disabled.). The Supreme Court has held that ERISA plan administrators are not required to "accord *special* weight to the opinions of a claimant's physician." *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 834 (2003) (emphasis added). However, it is unreasonable for an administrator to completely disregard—without explanation—a claimant's treating physicians when they remain uncontroverted in the record. *See Id.* ("Plan administrators...may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician."); *Dunbar*, 265 F. Supp. 2d at 583 (faulting administrator's "disregard without discussion the opinions of three of plaintiff's treating doctors" and failure to obtain an independent medical examination).

Alcoa, which operated under a probable conflict of interest, disregarded the uncontroverted reports of Thomas' treating physicians, failed to obtain an independent medical examination and arrived at an inconsistent assessment of Thomas' condition in the face of clear evidence of deterioration; these circumstances reveal that Alcoa's decision was not the product of a deliberate and principled reasoning process.

B. Substantial Evidence

It is impossible for this Court to ascertain how Alcoa reached its eligibility decision in November of 2006 or what evidence it relied upon. In its November 30, 2006, letter to Thomas, Alcoa's Appeals Committee stated:

> After a thorough evaluation of your case, and based on plan provisions and the independent medical review, your appeal has been denied. The reason for this determination is that the

> medical documentation provided does not indicate a totally disabling condition as defined by the plan.

(R. 0001.) This is not a well-supported explanation that is indicative of a thorough and searching examination of the record. Instead, this is the sort of unsubstantiated *ipse dixit* decree that this Court has consistently found insufficient. *See Watson*, 185 F. Supp. 2d at 588; *Laser*, 211 F. Supp. 2d at 656-57; *see also Gallagher v. Reliance Standard Life Ins. Co.*, 171 F. Supp. 2d 594, 603 (W.D.N.C. 2001) (faulting plan administrator who relied on its own nurse's opinion that claimant could work without "supply[ing] any basis for her conclusion."). After conducting its own review, this Court realizes that Alcoa could not have explained its denial of benefits with conviction because the evidence in the record does not lend credible support.

In its supporting memorandum for its motion for summary judgment, Defendant claims that there was insufficient objective evidence in the record to support a diagnosis of total disability. (Def.'s Mem. at 14-16.) But this Court finds that the record is saturated with medical tests and other forms of objective evidence that document Thomas' history of disabilities. A nerve conduction study was performed in February of 2005 that showed severe radicular disease in his cervical spine. (R. 0052.) MRIs were conducted in January and October of 2005 and in March of 2006 that documented Thomas' progressive spinal problems. (R. 0707-08, 0709-10, 1007, 1009.) Three months after surgery, Dr. Kaplan conducted a functional capacity assessment that documented Thomas' inability to stand or sit for an extended period of time, and his chronic pain syndrome, cervical and lumbar radiculopathy, carpal tunnel syndrome, diabetic peripheral neuropathy, morbid obesity, and sleep apnea. (R. 0837-38.) The results of electrodiagnostic testing in June 2006 showed significant neurological injuries that explain Thomas' chronic pain syndrome and his development of spinal gait disturbance which impairs

his ability to walk and has caused him to fall periodically. (R. 0057-59, 0061-62.) In July of 2006 Thomas underwent two electromyogram ("EMG") studies that demonstrated bilateral lumbosacral radiculopathies and neuropathy of the lower extremities and a CT scan conducted in August of 2006 showed continued spinal deformities. (R. 0022-23.)

Defendant also contends that the reports of Thomas' treating physicians were properly marginalized because they relied primarily upon "subjective pain complaints." (Def.'s Mem. 16.) This claim is simply incorrect, for Thomas' treating physicians repeatedly cited test results and other objective forms of evidence in their reports diagnosing his total disability. (R. 0052-53, 0036-37, 0040-41.) Moreover, it was improper for Defendant to completely disregard the subjective forms of evidence in the record. *See Laser*, 211 F. Supp. 2d at 656 (citing *Brenner v. Hartford Life & Acc. Ins. Co.*, 2001 U.S. Dist. LEXIS 2480, at *11 (D. Md. Feb. 23, 2001)). Subjective complaints of pain that illuminate the nature or severity of a disability should be considered, especially when they are corroborated by objective forms of evidence, as was the case here. *Hyatt v. Sullivan*, 899 F.2d 329 (4th Cir. 1990) ("[i]f an underlying impairment capable of causing pain is shown, subjective evidence of the pain, its intensity or degree, can, by itself, support a finding of disability."). Alcoa cannot justify its disregard for subjective evidence in the record by the fact that it also turned a blind eye to corroborating objective evidence. *Willis v. Baxter Int'l, Inc.*, 175 F. Supp. 2d 819, 831 (W.D.N.C. 2001) (rejecting plan administrator's requirement that claimant show "objective medical proof of subjective impairments").

The record also includes Thomas' favorable decision regarding his claim for Social Security disability benefits. (R. 0078-82.) While Alcoa is not bound by the Administrative Law

Judge ("ALJ"), its findings should have been weighed by the company as relevant evidence.[6] *See Hines v. Unum Life Ins. Co. of America*, 110 F. Supp. 2d 458, 468 (W.D. Va. 2000). This is particularly the case when there is sufficient similarity between the Plan's definition of disability and the definition given by Social Security Administration regulations. *Elliott*, 190 F.3d at 607. Within the context of social security claims, a person is disabled if he or she has an "inability to do any substantial gainful activity by reason of any medically determinable physical or medical impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 20 C.F.R. § 404.1505(a)(2008). The Plan provides, in part, that one is totally disabled when "because of injury or sickness . . . After the first 24 months, you cannot perform each of the material duties of any gainful occupation for which you are reasonably suited by training, education, or experience." (R. 1123.) The definitions are sufficiently similar to find that the ALJ's decision should have been considered as relevant evidence in Alcoa's eligibility for disability benefits under ERISA.[7] *See, e.g., Hines*, 110 F. Supp. 2d at 468; *Elliott*, 190 F.3d at 607.

Not only did Alcoa improperly disregard objective and subjective evidence supporting total disability, but its opposing position that Thomas was capable of sedentary work is not independently substantiated. As mentioned above, the record contains no reports from

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[6] There is no evidence that Alcoa considered the significance of the ALJ's determination of disability. While the ALJ's determination did not bind Alcoa, it was improper for the company to disregard it without providing an explanation.

[7] The similarities in the definitions distinguish this case from the situation in *McCready v. Standard Ins. Co.*, 417 F. Supp. 2d 684, 702 (D. Md. 2006) where there was "no indication that the definition of [disability] under the Plan in any way mirror[ed] the relevant definition under the regulations of the [Social Security Administration]."

independent medical examiners that contradict or challenge Thomas' treating doctors' diagnoses of total disability. Moreover, there is insufficient evidence showing a sustained improvement in Thomas' condition between Alcoa's extension of disability benefits in March of 2004, and its final dismissal of his claim in November of 2006. Defendant selectively notes findings by Doctors Dennis and Shuey that Thomas had recovered and briefly improved after surgery. (Def.'s Reply at 2, n.1) However, observations of *brief* improvement do not constitute evidence of *sustained* improvement. Indeed, a comprehensive evaluation of the record reveals that Thomas' disability worsened during the years leading up to Alcoa's denial of Thomas' final appeal. Diagnostic tests issued subsequent to Thomas' cervical spine surgery revealed extensive and worsening cervical, thoracic and lumbar spine disorders, including degenerative disc disease, disc desiccation, spondylosis, disc herniation and protrusion, foraminal stenosis, and possibly cervical cord compression. In addition, Thomas continued to be afflicted by carpal tunnel syndrome bilaterally, morbid obesity, sleep apnea, and peripheral neuropathy secondary to diabetes. (R. 0052-53.) Based upon these findings, Doctors Kaplan, Blam, Shuey, and Gallager independently concluded that Thomas was totally disabled in the months prior to Alcoa's final review. (R. 0036-37, 0040-41, 0052-53, 0060-61.)

Moreover, some of the evidence emphasized by Alcoa's retained consultants was not germane to the precise issue before the administrator: whether Thomas was capable of full-time sedentary employment for which he is "reasonably suited by training, education, or experience." (R. 1123.) Alcoa's independent consultant, Dr. McGraw posited that Thomas was capable of sedentary employment because he could perform "activities of daily living" and "simple

household chores at home."[8] (R. 0024.) But Dr. McGraw fails to explain how Thomas' ability to engage in certain household activities has any bearing on his capacity to perform the "material duties" of sedentary employment that correspond with his "training, education, or experience." (R. 1123.) For instance, Thomas' ability to perform a couple of brief household tasks does not shed light on whether he is "capable of working a regular work day on a consistent, day-in and day-out basis." *Brenner*, 2001 U.S. Dist. LEXIS 2480, at *19. Alcoa's conclusion that Thomas was capable of sedentary employment is hard to square with Dr. Kaplan's certification that Thomas was unable to "stand or sit for any extended period of time" and an undated MetLife assessment of Thomas' capacity to sit for only 15-20 minutes per hour, stand for only five minutes per hour, and walk for only 3 minutes per hour. (R. 0625.) *See Donovan v. Eaton Corp., Long Term Disability Plan*, 462 F.3d 321, 327 (4th Cir. 2006) (faulting peer reviewers for relying upon claimant's ability to perform activities of daily living while ignoring certifications that claimant could not "sit, stand, or walk for any period of time without having to change positions because of the severe pain.") In addition, evidence in the record shows that Thomas had become "clearly dependent on [pain] medications," a circumstance that would impair his ability to stay awake and alert during working hours. (R. 0061-62.)

Finally, the conclusions found in Broadspire's "Employability Assessment Report" and "Labor Market Survey" are of very limited probative value. (R. 0967-0984.) The only sources of medical evidence the reports cite to are Broadspire's questionnaire and Dr. Sassoon's

[8] Dr. McGraw's statements as to Thomas' ability to perform sedentary activities is presumably based on the "Profile Evaluation" that Thomas submitted to MetLife in October of 2003. ( R. at 0307-12.) The information contained in the evaluation does not reflect the three years of progressive deterioration in Thomas' condition leading up to Dr. McGraw's report of November 2, 2006.

physician peer report. (R. 0967.) "'[I]n order for a vocational expert's opinion to be relevant or helpful, it must be based upon a consideration of all other evidence in the record . . . .'" *Hardt v. Reliance Standard Life Ins. Co.*, 540 F. Supp. 2d 656 (E.D. Va. 2008) (quoting *Hines v. Barnhart*, 453 F.3d 559, 561 (4th Cir. 2006) (citation omitted)). Moreover, the Labor Market Survey, which only identified two jobs for which Thomas was reasonably suited, appears to have been arbitrarily administered. For instance, it is not clear how Thomas could survive the daily commute from his home in Baltimore to a job at the Hyatt Hotel in Washington, D.C., when he cannot drive for longer than 15 minutes. (R. 0969.) In addition, it is not clear how Thomas could work in "Electronic Assembler/Small Parts" position that "requires assembling circuit boards" while "using [a] microscope" given Thomas' documented neuropathy and the fact that he appears to have no prior training or experience that qualifies him for the job. (R. 0978.) In sum, not only does the Labor Market Survey lack a substantial evidentiary basis, it fails to provide sufficient explanations for its results.

## CONCLUSION

Because Alcoa was operating under a probable conflict of interest, its determination must be based on far more secure evidentiary footing to be considered reasonable. It is difficult to comprehend how Alcoa could have certified that Thomas had fulfilled his evidentiary burden in 2004, but then reversed this determination more than two years later after the record had been supplemented with compelling evidence of Thomas' deteriorating condition. The administrator could only have reached this peculiar result by a selective and incomplete review of the record—a review that was likely distorted by Alcoa's motivations to reduce the expense to its bottom line. As plan administrator, Alcoa abused its discretion because its eligibility

determination was not supported by substantial evidence and was not the product of a deliberate and principled reasoning process.

Having noted the deficiencies in Alcoa's decision-making process and the lack of evidentiary support, this Court remands this matter to Defendant Alcoa as the ERISA plan administrator. While the Fourth Circuit has cautioned that "'remand should be used sparingly,'" it is "most appropriate 'where the plan itself commits the trustees to consider relevant information which they failed to consider'" during their initial review. *Elliott*, 190 F.3d at 609 (citing *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1008 (4th Cir. 1985)); *see also Weaver v. Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir. 1993) ("where the plan administrator has failed to comply with ERISA's procedural guidelines...the proper course of action is to remand to the plan administrator for a full and fair review.") (citation omitted). The remand of this matter is consistent with this Court's previous review of similar ERISA disability cases. *See Laser*, 211 F. Supp. 2d at 657.

When it reconsiders Thomas' eligibility status, Alcoa is advised to make a more searching review of the objective and subjective evidence in the record and to properly address and consider the opinions of his treating physicians. The record should be supplemented by updated evidence concerning the course of Thomas' disability since the final dismissal date of his appeal in November of 2006. Towards this end, Thomas should be compelled to submit to an independent medical examination, as permitted by the Plan. Finally, Alcoa should supply a thorough and detailed basis for its final determination.

For the reasons stated above, Plaintiff's Motion for Summary Judgment (Paper No. 14) is DENIED and Defendant's Motion for Summary Judgment (Paper No. 15) is DENIED and this case is REMANDED to Defendant, as ERISA plan administrator, for further consideration.

A separate Order follows.

Dated: September 5, 2008

/s/
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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| PHILLIP R. THOMAS, | * | |
| Plaintiff, | * | |
| v. | * | Civil Action No. RDB-07-1670 |
| ALCOA INC., | * | |
| Defendant. | * | |

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O R D E R

For the reasons stated in the accompanying Memorandum Opinion, it is this 5th day of September 2008, hereby ORDERED, that:

a. Plaintiff Philip R. Thomas' Motion for Summary Judgment (Paper No. 14) is DENIED;

b. Defendant Alcoa Inc.'s Motion for Summary Judgment (Paper No. 15) is DENIED;

c. This case is REMANDED to Defendant, as ERISA plan administrator, for further consideration.

/s/
Richard D. Bennett
United States District Judge